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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 45

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 46

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 47

RAILROAD COMMISSION OF TEXAS,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 48

SAVANNAH SUGAR REFINING CORPORATION,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM OF AMERICAN BARGE LINES COMPANY, INLAND WATERWAYS CORPORATION, OPERATING FEDERAL BARGE LINES, AND MISSISSIPPI VALLEY BARGE LINE COMPANY.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, ET AL.,

Defendants.

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, American Barge Lines Company, Inland Waterways Corporation operating Federal Barge Lines, and Mississippi Valley Barge Line Company, intervening defendants in the above-entitled cause, move that the judgment and the decree of the District Court be affirmed.

Statement

This is a direct appeal from the final judgment and decree of a specially constituted court of three judges dismissing the suit of the Alabama Great Southern Railroad Company and other plaintiff railroads to set aside an order of the Interstate Commerce Commission. Findings

of fact, conclusions of law, and the judgment and decree of the court were entered on January 12, 1950. The appeal of the plaintiff railroads was allowed on March 7, 1950, and appeal papers were served on Chicago counsel on that date.

The Commission's order, dated June 13, 1949, was made in a proceeding docketed as *No. 26712*. That was an investigation instituted by the Commission on its own motion into and concerning the reasonableness and lawfulness otherwise of existing differential through routes and joint rates between the above-named barge lines and their rail connections, and for the purpose of determining and establishing such additional reasonable through routes and differentials as might be justified for barge-rail service. The above-named barge lines and the plaintiff-appellant railroads were respondents in the Commission proceeding. Hearings were had over a period of eight years, during which more than 16,000 pages of testimony and over 1,500 statistical exhibits were received in evidence. At the conclusion of the hearings, the Examiner of the Commission submitted a proposed report to which exceptions were filed and oral argument had. Thereafter the Commission issued its report on July 7, 1948, as modified on June 13, 1949. That report, accompanied by an order of June 13, 1949, required the respondents, collectively, to establish specified through routes and to observe specified differentials to take the place of and in addition to the through routes and differential rates then in effect. The respondent railroads elected not to comply with the order of the Commission but instead filed this suit.

Stripped of surplusage, duplication and formalistic matters of pleading, the plaintiff railroads relied in the District Court on three alleged grounds of invalidity: (1) that the ultimate conclusion of the Commission is not adequately supported by findings which disclose the

premises, methods, and processes by which the Commission arrived at the prescribed differentials; (2) that the Commission did not act upon the evidence nor did it give due consideration to all relevant facts and factors but rather it prescribed differentials arbitrarily based solely on a presumed policy of Congress; and (3) that in the light of the record and the findings, or lack of findings, in the report as to relative costs of service, the Commission misconstrued the governing statutes in fixing differentials in favor of the barge-rail routes. This third point rests on two alleged factual premises, and one legal proposition, i.e., (a) that the Commission affirmatively found barge-rail costs of service to be no less than all-rail costs for transporting like commodities between like points, (b) that the evidence affirmatively showed the railroads to be the lower cost agency, and (c) that the Commission cannot, within the authority conferred by section 307(d) of the Interstate Commerce Act (49 U.S.C. § 907(d)), determine and prescribe differential barge-rail rates unless it uses relative costs of service as the controlling measure thereof.

Summary of District Court's Opinion

The District Court found against the plaintiff railroads on all points. It held:

1. That the Commission's report has "ample support in evidence and in informally stated findings contained therein" and that "The Commission's conclusions, worded in the language of the statute authorizing the Commission to enter the order, seemed to us to comprise the '*quasi*-jurisdictional' findings which the Supreme Court has declared essential." (See also the court's Findings of Fact Nos. 3, 4, and 6.)

2. That "although the Commission placed great emphasis on what seemed to be the policy of Congress, it is evident

from the report that numerous other factors were given due consideration by the Commission;" and "that the Commission, far from acting arbitrarily, fixed the differentials only after due consideration of all the relevant factors and evidence."

3. That the exercise of the power conferred by section 307(d) to prescribe reasonable differentials between barge-rail and all-rail rates is not, as claimed by plaintiff railroads, made "conditional on an affirmative showing of lower operating costs;" and that "proof of lower costs of service is [not] an absolutely essential condition for the creation of such differentials."

4. That the finding of the Commission reading: "In the face of these facts, we cannot find that at the present time there are demonstrable economies in barge-rail transportation . . . which from the standpoint of cost of service would justify differentials," reflects simply a conclusion of the Commission that the evidence relating to relative cost of service in 1933-38 was stale and would not support any finding, one way or the other, as to present relations; and that "such a negative conclusion, we think, cannot be said to constitute an affirmative finding that all-rail costs are lower than barge-rail costs."

5. The District Court pointed out that the argument of the plaintiff railroads as the significance of relative costs of service "rests, of course, on the premise that the cost of shipping all-rail is, in fact, less than the cost of shipping barge-rail." As to that, the District Court found that the "plaintiffs have failed to establish the premise on which the argument is based."

6. In finding that the plaintiff railroads had not established the premise relied upon by them, the District Court noted that the only finding of the Commission on the point

was the negative finding referred to in paragraph 4 above, and further observed that the cost data relied upon by the railroads was not sufficient to support a finding, even if current, because it represented *average system costs* rather than the *costs actually incurred* in transporting the particular commodities which move in barge-rail service over the routes in question, citing *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 380-381.

7. The District Court further noted that to accept the views of plaintiff railroads as to the controlling effect of relative costs of service would compel the Commission to ignore what it should not ignore—the element of the value of the service to the customer; that to ignore the value of service "would end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads, which provide to the shipper a far superior service;" and that any costs to be used on the barge side of the equation in determining reasonable differentials in relation to existing all-rail rates would seem more likely to mean the costs, that is, the charges to the public.

Certain interests in Texas and at Savannah who have also appealed [1] intervened as plaintiffs to complain that the order of the Commission violates Article I, section 9, clause 6 of the Constitution, which prohibits a preference of the ports of one state over those of another, and that the order prescribes unreasonably low barge-rail rates which were arrived at by an improper process and which unduly prefer an advantage New Orleans over Savannah and the Texas ports. The District Court held that New Orleans enjoys barge service because of a natural advantage of its location on the

[1] Galveston Chamber of Commerce, Houston Port & Traffic Bureau, Railroad Commission of Texas, and Savannah Sugar Refining Corporation.

Mississippi River, which advantage could not be nullified by depriving New Orleans of barge-rail rates which are otherwise lawful, and that the enjoyment of that advantage was not prohibited by the Constitution, citing *Interstate Commerce Com.* v. *Diffenbaugh*, 222 U. S. 42, 46, and *Louisiana Pub. Serv. Com.* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131.

The Appeal Presents No Substantial Questions

The errors assigned by the plaintiff railroads are stated in 24 numbered paragraphs which involve considerable duplication. However, when interpreted and summarized in the plaintiff railroads' jurisdictional statement, all questions alleged to be substantial arise in connection with the following:

1. Is the order based on relevant evidence with consideration fairly given to all matters relied upon by the plaintiff railroads?

2. Is the order adequately supported by findings?

3. Is the power to prescribe barge-rail differentials conditioned upon the receipt of evidence and the making of findings with respect to costs of service via barge-rail as compared with via all-rail?

We show below that the appeal involves no substantial question as to any of these matters.

The Order Is Based on Relevant Evidence and on All of the Evidence

The railroad plaintiffs charge that the Commission rested its decision entirely on an assumed policy of Congress rather than the evidence in the record. But the detailed recitals of the District Court in Findings of Fact, Nos. 3, 4 and 6, as well as the comprehensive analysis of the Commission's report provided in its opinion, show such a charge to be

unfounded and without substance. Action within the competency of the Commission cannot be successfully challenged when based on relevant evidence of record. *Interstate Comm. Com.* v. *Union P. R. Co.*, 222 U. S. 541, 550; *Virginian R. Co.* v. *United States*, 272 U. S. 658, 663.

The plaintiff railroads also charge that the Commission based its decision in part on a fact not legally relevant to the issues, i.e., the inferiority of barge-rail service as compared with all-rail service. That fact bears upon the relative value of the service to shippers. In *United States* v. *Illinois C. R. Co.*, 263 U. S. 515, 524, the Supreme Court recognized value of the service as a valid criterion in rail rate-making, and the rule could hardly be different in a barge-rail rate case. That rule has been consistently observed by the Commission in rate cases of every kind and description, including the barge-rail rate cases cited in footnotes 3 and 4 below.

The final question as to evidence is whether any was ignored which the Commission should have considered. Neither in their complaint nor in their argument before the District Court did the plaintiff railroads specify any relevant, material, and competent, current evidence which the Commission failed to consider. However, in their jurisdictional statement they now assert that the Commission acted "in complete disregard of the evidence showing that the rail carriers are economically best fitted to handle the traffic" (p. 9); that the Commission disregarded and ignored the cost evidence of the railroads (pp. 9-11); and that the Commission ignored relative cost of service (p. 12). The report of the Commission plainly shows it considered the evidence of plaintiff railroads as to cost of service to be stale and, on that particular ground, insufficient to support an affirmative finding one way or the other on the point. The District Court accepted as proper this view of the Commission as to such evidence. The plaintiff railroads fail to

charge that either the Commission or the District Court erred in refusing to accept stale evidence as proof of current costs. Nor do they charge that the District Court erred in finding that evidence as to average railroad system costs for all traffic is not evidence as to actual costs of transporting particular traffic. Other than these unfounded and unpressed claims as to the disregard by the Commission of cost evidence, the plaintiff railroads do not allege that the Commission disregarded any evidence which meets the test of relevancy, competency and materiality.

The report of the Commission and the decision of the District Court plainly show that the appeal involves no substantial question relating to the matter of evidence.

The Order Is Supported by All Necessary Findings

The plaintiff railroads make two contentions which involve the matter of findings: (1) that the order is invalid because the Commission failed to make a specific finding as to the reasonableness of through rates which result from the observance of the differentials specifically found by it to be reasonable, and (2) that the order is invalid because the report of the Commission does not contain findings which describe the specific premises, methods and processes involved in the ultimate fixation of particular differentials.

The first contention rests on no allegation of complaint nor was it discussed in the District Court. However that may be, section 307(d) plainly discloses the intent of Congress to authorize the fixation of reasonable barge-rail rates by the direct process of fixing reasonable differentials. To fix reasonable differentials is to fix reasonable rates. Since the two cannot be legally distinguished, no substantial question is raised.

As to the second question—the alleged necessity for preliminary findings—the case is clearly controlled by *Balti-*

more & O. R. Co. v. *United States*, 298 U. S. 349, 359, in which the Supreme Court held that "There is no requirement that the Commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached. Useful precision in respect of either would be impossible."

The appeal presents no question which is either novel or substantial as to the matter of findings.

An Order Fixing Barge-Rail Differentials Need Not Be Based on a Finding as the Relation of Barge-Rail to All-Rail Costs of Service.

The plaintiff railroads contend that the power to prescribe reasonable differentials conferred by section 307(d) when construed in the light of the National Transportation Policy is conditioned on the receipt of evidence and the making of an affirmative finding with respect to relative costs of service. Practically everything said in their jurisdictional statement either starts from or comes back to this point, and on it their whole case rises or falls.

Before considering the legal question involved, we note that on occasion the plaintiff railroads proceed on the assumption that the Commission's negative finding as to lack of current evidence to prove demonstrable evidence is, in reality, an affirmative finding on the question of cost relations. But, as noted above, the District Court held squarely to the contrary and no error is assigned against that specific holding. Consequently, the only question raised on appeal is whether the lack of current evidence and an accompanying finding as to relative costs of service is fatal to the attempted exercise of the power conferred by section 307(d).

In support of their view, the plaintiff railroads assert that the decision of the Commission and the District Court

is inconsistent with the decision of the Supreme Court in *Interstate Commerce Com.* v. *Mechling*, 330 U.S. 567. But the plaintiff railroads treat that case as if it involved the reasonableness of rates under section 1, whereas it only involved the matter of rate discrimination against connecting lines under section 3(4) of the Interstate Commerce Act. Statements of the court at pages 571, 572-3, 575, 577, 580 and 581, clearly show that the court, in dealing with the issue before it, tested the inherent advantage of barge service by the relation of barge rates to rail rates rather than by the relation of barge costs to rail costs.

Many decisions of the Supreme Court, cited below, show that there is nothing new to be decided in this case as to the right of the Commission to fix reasonable rates in the absence of evidence and without findings as to cost of service. In *Louisiana Pub. Serv. Com.* v. *Texas & N. O. R. Co.*, 284 U.S. 125, 132, an order of the Commission requiring the addition of a particular plus amount to rates which covered the crossing of the Mississippi River was assailed as beyond the authority of the Commission because entered without evidence as to the cost of performing the special services involved. Plaintiffs' claim in that respect was squarely rejected by the Supreme Court. The court said:

> Neither the failure of the Commission separately to ascertain and state, nor the absence of evidence to show, the cost to carriers of the ferry service requires annulment of the rates prescribed for transportation between the places on the east bank of the Mississippi and points west of the river.

In *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 359; *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481; and *New York* v. *United States*, 331 U.S. 284, 331, the Supreme Court held that the weight to be given cost evidence and the degree of acceptance or rejec-

tion of such evidence is wholly within the Commission's final say-so.

In *New York* v. *United States, supra,* and in *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592, the Supreme Court held that the Commission is not required to fix rates and rate relations in direct proportion to relative costs or relative service, and that the prescription of rate relations known to be *contrary* to cost of service relations is within the authority of the Commission when based on evidence other than costs.

The rule on the point under consideration is so well settled that the appeal presents no substantial question unless section 307(d), as construed in the light of the National Transportation Policy, imposes a limit, restriction, or condition on the authority of the Commission when fixing barge-rail differentials which is not imposed in fixing other rates. That question will now be considered.

The Power conferred by Section 307(d) Is Not Conditioned on Findings as to Relative Cost of Service

There is nothing in the terms of section 307(d) or in the legislative history which suggests the limitation on the authority of the Commission for which the plaintiff railroads contend.

The existing differential rate structure has been built up beginning the period of World War I when the Director General of Railroads inaugurated barge service and fixed a 2 percent differential based on judgment rather than cost studies. Nothing in the *Transportation Act, 1920* (49 U. S. C. Sec. 142) when the railroads were returned to private control and barge operations were transferred to the Secretary of War; or in the *Inland Waterways Corporation Act* of 1924 (49 U. S. C. Sec. 151 and following), which transferred those operations to a Federal corporation; or

in the *Denison Act* of 1928,[2] which added to the Commission's authority to prescribe through routes and joint rates between barge lines and rail lines, so much as suggests that the reasonableness of differentials should be tested exclusively, or even in part, by a comparison of barge costs with rail costs.

The word "differential" was first mentioned specifically in the Denison Act. Prior to that time, the Commission had established reasonable joint rates and through routes between barge lines and rail lines under its general power over such joint rates when traffic is transported partly by railroad and partly by water under an arrangement for continuous carriage or shipment.[3] In so prescribing barge-rail rates, the Commission fixed reasonable differentials without any evidence as to relative costs of service but with full knowledge that the barge service was inferior and that differentials were necessary to attract the traffic.

In prescribing through routes and joint rates on a differential basis within certain limitations in proceedings under the Denison Act, the Commission again acted without any evidence whatsoever on the question of relative or comparative costs of service.[4]

When the railroads were ordered to join with barge lines in the adjustments prescribed under the Denison Act, they

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[2] (Public No. 601, Seventieth Congress) 45 Stat. 978, Chapter 891, amending Section 3 of the Inland Waterways Corporation Act of June 3, 1924.

[3] *U. S. War Department* v. *A. & S. Ry. Co.*, 77 I.C.C. 317; *Same* v. *Same*, 92 I.C.C. 528; *Inland Waterways Corp.* v. *C. G. W. R. R. Co.*, 129 I.C.C. 521; *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I.C.C. 126.

[4] *Application of American Barge Line Co.*, 182 I.C.C. 521, 190 I.C.C. 521, 190 I.C.C. 177; *Through Routes and Joint Rates*, 153 I.C.C. 129, 156 I.C.C. 141, 161 I.C.C. 207, 163 I.C.C. 716, 167 I.C.C. 385, 172 I.C.C. 525, 174 I.C.C. 477, 181 I.C.C. 675, 192 I.C.C. 173, 192 I.C.C. 663; and *Application of Mississippi Valley B. L. Co.*, 167 I.C.C. 41, 171 I.C.C. 37, 178 I.C.C. 224.

had the right to demand a hearing before making such adjustments effective if they so desired (*United States* v. *Illinois Central R. Co.*, 291 U. S. 457) but they chose not to avail themselves of that opportunity. It thus appears throughout the period prior to the enactment of the Transportation Act, 1940, which enactment added section 307(d) to the Interstate Commerce Act, that there was no reliance by the railroads, by the barge lines, or by the Commission on proof of relative costs of service as *an essential* to the determination of reasonable differentials.

The 1940 Legislation

In the late 30's there arose considerable demand for the complete regulation of water carriers in order to equalize competitive conditions and opportunities with rail and motor carriers, already under regulation. Responsive to this demand the President appointed a so-called "Committee of Six" consisting of 3 railway executives and 3 representatives of railway labor, to bring forward a proposed scheme of regulation. Previously in the same year he had requested a report from 3 Interstate Commerce Commissioners—Eastman, Splawn and Mahaffie—on the same subject. On the basis of these reports the Senate Committee on Interstate Commerce drafted a Bill—S.2009—which as amended from time to time and after several joint conferences with the House Committee finally became Transportation Act, 1940.[5]

The regulation of water carriers under this Bill was bitterly opposed by the champions of water transportation. Having in mind its genesis in the Committee of Six, they argued vehemently that it was a "railroad" bill having for its obvious purpose the destruction of water carriage.

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[5] See pages 1 and 2, Report No. 433 (1939) by the Chairman of the Senate Committee on Interstate and Foreign Commerce.

The debates contain many statements from sponsors of the legislation denying this charge and seeking to reassure the objectors. Perhaps the most pointed is a statement by Representative Halleck, a committee member and an ardent supporter of the Bill.[6] At p. 13517 Congl. Rec. July 21, 1939, his statement appears thus:

> Some people have argued and have asked me in good faith if we were not coming in here to destroy the water carriers. Well, now listen. This Government has spent millions and hundreds of millions of dollars to develop cheap economical transportation. No one would be so ridiculous as to seek to destroy this investment. The communities served by this transportation have a right to the continuation of this service. There is nothing in this Bill which seeks to destroy that service. Rail transportation is the most valuable transportation because it is faster and more convenient. The water people will admit that. *If a person had the same rate he would ship by rail rather than water.* As a result the ceiling of rates is fixed by the railroads. The water carriers operate under that ceiling at a competitive point because their costs are less. This bill recognizes that differential and the reason supporting it. This bill provides for the continuation of that differential. I might refer you to the provisions of the bill but I do not want to take the time necessary to read them.
>
> On page 260, in reference to the making of minimum rates for water carriage, this is said:
>
> "They shall pay attention to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service."
>
> Does that mean anything to you or are we to assume that the Interstate Commerce Commission is going to

[6] For additional reference to comments of a similar nature see footnote 8, *Interstate Commerce Comm.* v. *Mechling*, 330 U. S. 567.

throw all of those mandates out of the window? Why, of course, the rates on water transportation *will still be beneath the ceiling of the rail rates.* They will continue to carry on their business. (Emphasis supplied.)

Bearing in mind the facts that the statutes in effect prior to 1940:[7]

1. Contained no mention of the word "differential" until 1928 in the Denison Act;

2. Did not mention the element of "costs" as a condition precedent to the fixation of through barge-rail routes at rates lower than over all-rail routes, and

3. That the Commission had repeatedly prescribed such through routes and joint rates over the objection of the railroads.

it remains only to determine whether the 1940 legislation had the effect here claimed for it by the railroads, viz., that of making a showing of lower *operating* costs, an absolutely indispensable condition precedent to the requirement of barge-rail routes on a differential basis.

In Section 27 of S. 2009 (which displaced Sections 15(3) and 6(13) of the 1920 Act), as it passed the Senate two important changes in the 1920 legislation were made.[8]

1. It eliminated from the old (1920) act the limitation reading "(or, in the case of a through route where one of the carriers is a water line, the *maximum* rates * * * applicable thereto)," thus giving the Commission power to declare maximum, minimum, or maximum and minimum rates in connection with barge-rail routes;

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[7] Sections 6 and 15 from 1920 to 1928, and the Denison Act, 1928 to 1940.

[8] The 1940 act, as finally passed, repealed the Denison Act but left in force until the further order of the Commission all orders made under that act (Sections 320 and 322, Part IX).

> 2. It followed the philosophy of the Denison Act in making the fixation of differentials mandatory by inserting the clause "and in the case of a through route where one of the carriers is a water line, the *minimum differential* which should apply in connection with such route."

In the House, the limitation as to *maximum* rates was also eliminated. But on the question of "differentials" the House version used the following language:

> In the case of a through route where one of the carriers is a common carrier by water, the Commission *may* prescribe such reasonable differentials, *if any*, as it may find to be justified between all-rail rates and joint rates in connection with such common carrier by water. (Emphasis ours.)

Both Houses provided for the "differential"—the Senate in mandatory, the House in permissive terms. Neither mentioned the element of "costs."

Late in 1939 the Commission was asked to express its opinion as to the divergent views of the Senate and House in respect of the legislation and it did so in a report dated January 29, 1940,[9] by Commissioner Eastman as Chairman of the Commission's legislative committee. Addressing itself to the Senate version which read:

> and in the case of a through route where one of the carriers is a water line, (the Commission) shall prescribe the minimum differential which should apply in connection with such route (Parentheses added for clarity),

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[9] This report became House Committee Print on "Omnibus Transportation Legislation," 76th Congress, 3d Session, and it has been referred to by the Supreme Court on two occasions as an authoritative source of legislative history. *Ziffrin Inc.* v. *United States*, 318 U. S. 73, 77; *United States* v. *Seatrain Lines*, 329 U. S. 424, 430.

the Commission said, at p. 47:

> This is objectionable: (1) Because its meaning is not clear, since it does not indicate between what rates the "minimum differential" shall apply; (2) because, assuming that it means the minimum differential between a rail-water rate and the corresponding all-rail rate, it implies that there should always be such a differential, whereas if the rail-water route is unduly circuitous or otherwise uneconomical, there may be no justification for a differential; and (3) because, if the Commission does its duty in fixing reasonable maximum and minimum, or maximum and minimum rates, a differential will be provided for whenever one is justified.

Addressing itself next to the House version which read:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission *may* prescribe such reasonable differentials, *if any*, as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. (Emphasis ours.)

the report of the Commission stated (p. 47):

> If any such language is to be retained, however, the corresponding provisions of the House bill is unnecessary[10] but otherwise unobjectionable.

The Commission thus made it clear that with the positive language of the Senate version deleted from the Bill it would feel free to, and would consider it its "duty" to

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[10] Commissioner Eastman was the author of the two earlier decisions in which the Commission prescribed through rail-barge routes and *differential* rates, when the governing statutes (Sections 15(3) and 6(13)) not only contained no mention of "differentials" but carried a limitation that *rates* over rail-barge routes should be maximum rates. *U. S. War Department* v. *A. & S. Ry. Co.*, 92 I.C.C. 528; *Inland Waterways Corp.* v. *C. G. W. R. R. Co.*, 129 I.C.C. 521.

provide differentials unless they were clearly not justified because the proposed routes would be "unduly circuitous or otherwise uneconomical." On the record made in this case the Commission has concluded that the differentials prescribed are justified and are *not* uneconomical.

In the final draft of the Bill the positive mandate in the Senate version was dropped in favor of the House version. But the latter was first amended in two very important ways: (a) The word "shall" was substituted for the word "may" and (b) the words "if any" were deleted.

There is nothing in the legislative history to support the conclusion that in using the term "or otherwise uneconomical" the Commission had reference to "costs" and, more particularly to "system average costs" which, as the District Court held in effect, are utterly worthless in determining whether in any instance a barge-rail route should be prescribed. In addition to the element of undue circuity in the latter type of route—always important—the element of "relative service" comes into play. In other words, it would be wholly "uneconomical" to provide for or to operate a through barge-rail route from Buffalo, N. Y., to New Orleans, La., contemplating water carrier participation only between Cincinnati, O., and Louisville, Ky. The Commission in all of its orders has provided not alone against undue circuity but has required that the haul of the water carrier must be a prescribed percentage of the total haul.

The Commission was eminently correct in concluding (p. 611) that "neither the wording nor the legislative history" of section 307(d) "supports the conclusion that differentials are justified only where there is an affirmative showing of lower operating costs." Consequently, the appeal raises no substantial question as to this point.

Questions Raised by the Appeals of Texas and Savannah Interests Are Not Within the Scope of Judicial Review

The separate appeals of the Texas and Savannah interests present no question within the scope of judicial review which is not presented in the appeal of the plaintiff railroads. These intervening plaintiffs are dissatisfied with the Commission's order because it provides for New Orleans the advantage of its geographical location on the Mississippi River. That does not nullify the order but rather supports it under the doctrine of *Interstate Comm. Com.* v. *Diffenbaugh*, 222 U. S. 42, 46, in which the Supreme Court held that "the law does not attempt to equalize fortunes, opportunities or abilities."

The assignments of error and the discussion in the jurisdictional statements of these intervening plaintiffs indicate that what they really seek is to have the Supreme Court substitute its judgment for that of the Commission as to the measure of the differentials to be prescribed and as to the processes which should be followed in arriving at such differentials. Since any such action on the part of the Supreme Court would be beyond the scope of judicial review, these appeals present no substantial question. As to the other point made by these intervening plaintiffs, the alleged violation of the port preference clause in the Constitution, the correctness of the holding of the District Court is fully supported by *Louisiana Pub. Serv. Com.* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131.

Conclusion

Section 14(1) (49 U. S. C., §14(1)) provides:

> That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and *in case damages are awarded* such report shall include the findings of fact on which the award is made.

No damages were awarded in this case and the Commission was under no obligation to "specify the weight given to any item of evidence or fact or disclose mental operations by which its decision was reached" (*Baltimore & O. R. Co.* v. *United States, supra*). Under the doctrine of *Rochester Telephone Corp.* v. *United States*, 207 U. S. 125, 140, "only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be reached. If these legal tests are satisfied, the Commission's order becomes final."

Congress, and through it the Commission, has undoubted power under the commerce clause to prescribe through routes and joint rates whenever it finds such prescription to be in the public interest. Once that finding is made, as it was in this case, the order of the Commission is valid unless (a) it acted without substantial evidence, or (b) its order results in rates which are confiscatory. The record of 16,000 pages and 1,500 multiple-page exhibits affords mute testimony as to the substantiality of the evidence. The railroad plaintiffs are in no position to raise the question of confiscation because, under the scheme of differentials prescribed, they will receive revenue out of the joint

rates with barge lines substantially the same as they would receive from railroad connections.

Since it is evident that none of the appeals present questions which are either novel or substantial, it is respectfully submitted that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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